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1 **FEDERAL ELECTION COMMISSION**
2 **999 E Street, N.W.**
3 **Washington, D.C. 20463**

4
5 **FIRST GENERAL COUNSEL'S REPORT**

CELA

6
7 MUR: 6405

8 DATE COMPLAINT FILED: October 21, 2010

9 DATE OF NOTIFICATION: October 28, 2010

10 DATE OF LAST RESPONSE: December 13, 2010

11 DATE ACTIVATED: January 19, 2011

12
13 ELECTION CYCLE: 2010

14 EXPIRATION OF SOL: October 19, 2015

15
16 **COMPLAINANT:**

Democratic Congressional Campaign Committee

17
18 **RESPONDENTS:**

Friends of John McCain Inc. and Keith A. Davis
in his official capacity as Treasurer¹

John McCain

Ruth McClung for Congress and Anne Lofffield in
her official capacity as Treasurer

Ruth McClung

Kelly for Congress and Kristen L. Smith in her
official capacity as Treasurer²

Jesse Kelly

27
28 **RELEVANT STATUTES**
29 **AND REGULATIONS:**

52 U.S.C. § 30102(e)(3)³

52 U.S.C. § 30116(a)(7)(B)(i)

11 C.F.R. § 100.22(a)

11 C.F.R. § 102.13(c)

11 C.F.R. § 109.21

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35 **INTERNAL REPORTS CHECKED:**

FEC Disclosure Reports

36
37 **FEDERAL AGENCIES CHECKED:**

None

¹ The treasurer of Friends of John McCain Inc. at the time of the activity in this matter was Thomas R. Holtrup.

² Kelly for Congress filed a Termination Report that was accepted by the Commission on January 31, 2013.

³ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended ("the Act"), was transferred from Title 2 of the United States Code to new Title 52 of the United States Code.

1 I. INTRODUCTION

2 In October 2010, Senator John McCain's authorized campaign committee aired two
3 television advertisements in which McCain and then-Arizona Senator Jon Kyl appear together
4 and urge the election of the Republican candidates in Arizona's 7th and 8th Congressional
5 districts, Ruth McClung and Jesse Kelly, respectively, and the defeat of their opponents.⁴ The
6 Complaint alleges that the McCain campaign coordinated the advertisements with McClung
7 and Kelly, which resulted in McCain making an excessive in-kind contribution to each.
8 Further, the Complaint alleges that the advertisement caused McCain's authorized committee
9 to "violate[] the conditions" of its authorized committee status because 52 U.S.C.
10 § 30102(e)(3) (formerly 2 U.S.C. § 432(e)(3)) prohibits an authorized campaign committee
11 from supporting more than one candidate.⁵

12 In response to the Complaint, McCain's Committee denies that the advertisements
13 were coordinated, and argues that the Complaint does not explain how the "coordinated
14 communications" conduct standards were met or allege any coordination-related facts.
15 McCain Resp. at 2 (Dec. 13, 2010). With respect to the allegation that the Committee
16 violated its authorized committee status, it argues that the ads at issue were consistent with its
17 status because the communications ultimately supported Senator McCain's candidacy and
18 because the Committee was permitted to sponsor independent communications that
19 referenced other candidates. *Id.* at 2-6.

20 Because the Complaint provides no specific facts demonstrating that the ads were
21 coordinated and the McCain Committee sufficiently refutes the allegations, we recommend

⁴ McCain was a candidate for re-election in 2010; Kyl, therefore, was not a candidate in the 2010 election. McClung and Kelly each lost their election.

⁵ Because of Senator McCain's knowledge of campaign finance law, the Complaint requests that the Commission determine whether the violations were knowing and willful. Compl. at 3-4 (Oct. 21, 2010).

1 that the Commission dismiss the allegation that McCain made, and McClung and Kelly
2 received, an excessive contribution in the form of a coordinated communication. For the
3 reasons set forth below, we also recommend that the Commission dismiss the allegation that
4 the McCain Committee violated 52 U.S.C. § 30102(e)(3) (formerly 2 U.S.C. § 432(e)(3)) by
5 running ads which advocate for the election of, *i.e.*, "support," another candidate.

6 **II. FACTUAL AND LEGAL ANALYSIS**

7 **A. Factual Background**

8 Senator McCain was a candidate for re-election in 2010. Ruth McClung and Jesse
9 Kelly were 2010 Congressional candidates in Arizona's 7th and 8th Congressional districts,
10 respectively. On or about October 18, 2010, the McCain Committee began airing two
11 television advertisements titled "Vote Ruth McClung" and "Vote Jesse Kelly," featuring
12 Senator McCain and his fellow Arizona Senator, Jon Kyl. McCain and Kyl are seated next to
13 each other in front of a solid black background and speak directly to the camera for the
14 duration of the advertisements. For the first five seconds of each advertisement, a caption
15 appears at the bottom of the screen identifying the Senators as "Arizona Senators Jon Kyl and
16 John McCain."

17 The scripts of the advertisements are as follows.

18 Script for "Vote Ruth McClung"

19
20 McCain: Arizonians are struggling, yet Raul Grijalva
21 voted for the failed stimulus, Obamacare, and tax
22 increases that have devastated our state and
23 nation.
24
25 Kyl: Grijalva even led the call for a boycott of our
26 own State that costs Arizona jobs and millions
27 of dollars, hurting us all.
28
29 McCain: We urge you to elect Ruth McClung. She'll do

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what's right for Arizona.⁶ I'm John McCain and I approve this message.

See http://www.youtube.com/watch?v=MEDoaGQE8_I.

Script for "Vote Jesse Kelly"

McCain: While Arizona families are struggling, Gabrielle Giffords voted for the failed liberal Pelosi-Obama agenda.

Kyl: She voted for the failed stimulus package and Obamacare, and received a grade of "F" from the National Taxpayers Union for supporting so much spending and debt.

McCain: Gabrielle Giffords is out of step with Arizona. And that's why we need Jesse Kelly in Congress.⁷ I'm John McCain and I approve this message.

See <http://www.youtube.com/watch?v=pWYD1JuRYWw.html/>.

At the end of each advertisement, the following written message appears on the screen along with footage of Senator McCain in the outdoors, looking into the camera:

VOTE TUESDAY
November 2nd

ARIZONA'S
JOHN McCAIN
U.S. SENATE

JohnMcCain.com
Text McCain to 69872 (MYUSA)

AUTHORIZED BY JOHN MCCAIN. PAID FOR BY FRIENDS OF JOHN MCCAIN.

The McCain Committee disclosed that it made independent expenditures for "media" and "media production" totaling \$183,744 on October 19, 2010, in support of Ruth McClung

⁶ While McCain recites this sentence the following text appears on the screen: "Please elect Ruth McClung. What's right for Arizona." (emphasis in original).

⁷ While McCain recites this sentence the following text appears on the screen: "Please elect Jesse Kelly. What's right for Arizona." (emphasis in original).

1 and Jesse Kelly (\$91,872 for each). *See* Friends of John McCain Inc. 2010 Post-Gen. Report
2 at 267-70 (Dec. 2, 2010).

3 **B. Analysis**

4 The Complaint alleges that the McCain Committee coordinated the television
5 advertisements with McClung and Kelly, respectively, resulting in the McCain Committee
6 making an excessive in-kind contribution to each campaign and violating the conditions of its
7 authorized committee status. Compl. at 3. Under the Act, a candidate's authorized campaign
8 committee may contribute up to \$2,000 per election to another candidate's authorized
9 campaign committee.⁸ 52 U.S.C. § 30102(e)(3)(B) (formerly 2 U.S.C. § 432(e)(3)(B)).
10 A contribution includes a gift, subscription, loan, advance, or deposit of money or anything of
11 value made by any person for the purpose of influencing a federal election. 52 U.S.C.
12 § 30101(8)(A)(i) (formerly 2 U.S.C. § 431(8)(A)(i)). The term "anything of value" includes
13 in-kind contributions. 11 C.F.R. § 100.52(d)(1). In-kind contributions include expenditures
14 made by any person "in cooperation, consultation, or concert, with, or at the request or
15 suggestion of, a candidate, his authorized political committees, or their agents." 52 U.S.C.
16 § 30116(a)(7)(B)(i) (formerly 2 U.S.C. § 441a(a)(7)(B)(i)).

17 Under 11 C.F.R. § 109.21, a communication is coordinated if it: (1) is paid for by a
18 person other than the candidate or candidate's committee; (2) satisfies one or more of the four
19 content standards set forth at 11 C.F.R. § 109.21(c); and (3) satisfies one or more of the six
20 conduct standards set forth at 11 C.F.R. § 109.21(d). Expenditures for communications that
21 are coordinated with a candidate or a candidate's authorized committee are considered

⁸ The Complaint cites to the contribution limit at 52 U.S.C. § 30116(a)(1) (formerly 2 U.S.C. § 441a(a)(1)); however, the applicable limit for contributions by an authorized campaign committee to another authorized campaign committee is at 52 U.S.C. § 30102(e)(3)(B) (formerly 2 U.S.C. § 432(e)(3)(B)).

1 contributions to that candidate. 52 U.S.C. § 30116(a)(7)(B)(i) (formerly 2 U.S.C.
2 § 441a(a)(7)(B)(i)). Thus, if the McCain Committee coordinated the advertisements with the
3 Kelly or McClung committees, the costs of the advertisements are an in-kind contribution
4 from the McCain Committee, and could not exceed the \$2,000 contribution limit.

5 In this matter, the available information does not show that the communications were
6 coordinated. The first prong of the coordinated communication test is satisfied because the
7 McCain Committee is a third-party payor with respect to the portion of the ads that benefitted
8 the Kelly and McClung committees. The second prong, the content standard, is also satisfied
9 because each advertisement contains express advocacy under 11 C.F.R. § 100.22(a). See
10 11 C.F.R. § 109.21(c)(3). Commission regulations set forth that "expressly advocating"
11 includes any communication that uses phrases such as "vote for the President," "re-elect your
12 Congressman," "Smith for Congress," *inter alia*. 11 C.F.R. § 100.22(a). The "Vote Jesse
13 Kelly" advertisement expressly advocated the election of Kelly by asking the viewer to
14 "Please elect Jesse Kelly;" and the "Vote Ruth McClung" advertisement expressly advocated
15 McClung's election by stating "We urge you to elect Ruth McClung."⁹

16 While the payment and content prongs of the coordinated communications regulations
17 appear to be satisfied in this matter, the conduct prong does not. The conduct prong is
18 satisfied where any of the following types of conduct occurs: (1) the communication was
19 created, produced, or distributed at the request or suggestion of a candidate or his campaign;
20 (2) the candidate or his campaign was materially involved in decisions regarding the

⁹ The advertisements may also meet the content standard as "electioneering communications" under 11 C.F.R. § 100.29. See 11 C.F.R. § 109.21(c)(1). Each advertisement refers to two clearly identified candidates for public office (Senator McCain and Ruth McClung in one, and Senator McCain and Jesse Kelly in the other) and the ads were reportedly run on or about October 18, 2010, within 90 days of the November 2 general election. See 11 C.F.R. § 109.21(c)(4). The available information also shows that the advertisements were also "disseminated exclusively in Arizona," McCain's relevant electorate. See McCain Resp., Buse Decl. ¶ 3.

1 communication; (3) the communication was created, produced, or distributed after substantial
2 discussions with the campaign or its agents; (4) the parties contracted with or employed a
3 common vendor that used or conveyed material information about the campaign's plans,
4 projects, activities or needs, or used material information gained from past work with the
5 candidate to create, produce, or distribute the communication; (5) the payor employed a
6 former employee or independent contractor of the candidate who used or conveyed material
7 information about the campaign's plans, projects, activities or needs, or used material
8 information gained from past work with the candidate to create, produce, or distribute the
9 communication; or (6) the payor republished campaign material. *See* 11 C.F.R. § 109.21(d).

10 The Complaint does not allege specific facts indicating that the conduct prong is met,
11 nor do we currently have any information supporting that conclusion. Further, the McCain
12 Committee has specifically denied facts that would give rise to a conclusion that the conduct
13 prong is satisfied pursuant to 11 C.F.R. § 109.21(d). Mark A. Buse, campaign manager for
14 the McCain Committee during the 2010 general election period, denies in a sworn declaration
15 that the advertisements at issue were created at the request or suggestion of, or with the
16 material involvement of, any agent of Jesse Kelly for U.S. Congress or Ruth McClung for
17 Congress. *See* McCain Resp., Buse Decl. ¶¶ 4-7. Buse also avers that the McCain
18 Committee did not employ the services of any former employee or independent contractor of
19 Jesse Kelly for U.S. Congress or Ruth McClung for Congress, and had no common vendors
20 with the campaigns. *See id.* ¶¶ 8-9. Given these denials and the absence of any other
21 information suggesting coordination, the Commission lacks a basis to conclude that the

1 advertisements at issue constituted coordinated communications that resulted in excessive
2 contributions.¹⁰

3 The Complaint further alleges, however, that the McCain Committee jeopardized its
4 authorized committee status by providing illegal "support" to the McClung and Kelly
5 campaigns in violation of 2 U.S.C. § 432(e)(3) (now 52 U.S.C. § 30102(e)(3)), an allegation
6 that may not require coordination between the committees. In response to this allegation, the
7 McCain Committee argues that the advertisements at issue were consistent with its authorized
8 committee status because the communications ultimately supported Senator McCain's
9 candidacy and because the Committee is permitted to sponsor independent communications
10 that reference other candidates.

11 The Act provides that "[n]o political committee which supports or has supported more
12 than one candidate may be designated as an authorized committee." *See* 52 U.S.C.
13 § 30102(e)(3)(A), (B) (formerly 2 U.S.C. § 432(e)(3)(A), (B)); 11 C.F.R. § 102.13(c)(1), (2).
14 Neither the Act nor the corresponding regulations define the term "support," but Section
15 30102(e)(3)(B) (formerly Section 432(e)(3)(B)) does specify that "the term 'support' does *not*
16 include a contribution by any authorized committee in amounts of \$2,000 or less to an
17 authorized committee of any other candidate." 52 U.S.C. § 30102(e)(3)(B) (formerly
18 2 U.S.C. § 432(c)(3)(B)); *see also* 11 C.F.R. § 102.13(c)(2). Thus, if an authorized committee
19 makes an expenditure for a communication that is coordinated with another candidate, the

¹⁰ We note that Kelly for Congress ("Kelly Committee") (the only respondents other than the McCain Committee to submit a response to the complaint) did not deny in its response that the "Vote Jesse Kelly" advertisement was coordinated with the McCain Committee. Rather, the Kelly Committee argued that the advertisement was not a coordinated communication because the advertisement did not promote or support McCain (an assertion that the McCain Committee directly contradicts in its response). Specifically, the Kelly Committee states that the advertisement met the safe harbor for endorsements by federal candidates at 11 C.F.R. § 109.21(g), which excludes from the definition of coordinated communication any public communication in which a federal candidate endorses another candidate for federal or nonfederal office unless the communication promotes, supports, attacks, or opposes the endorsing candidate or the endorsing candidate's opponent. Kelly Resp. at 2 (Dec. 10, 2010). The safe harbor, however, doesn't apply because the ads clearly support the endorsing candidate, McCain.

1 resulting in-kind contribution is limited to \$2,000 per election. As discussed above, in this
2 matter we do not have information establishing that the McCain Committee coordinated the
3 advertisements with the McClung or Kelly campaigns. Therefore, the question presented by
4 this allegation is whether 30102(e)(3)(B) (formerly Section 432(e)(3)(B)) precludes an
5 authorized committee of a federal candidate — in this case the McCain Committee — from
6 “supporting” another federal candidate by paying for independent communications that
7 expressly advocate for that candidate.

8 While this precise question has not been squarely addressed by the Supreme Court or
9 the Commission, the Supreme Court has clarified the state of the law concerning independent
10 expenditures in a number of other contexts. Specifically, in *Buckley v. Valeo*, the Supreme
11 Court struck down limits on independent expenditures for most individuals and groups. *See*
12 *Buckley v. Valeo*, 424 U.S. 1 (1976). In doing so, the Court distinguished between the
13 potential for corruption that attaches to contributions and coordinated expenditures, and those
14 that might develop from independent expenditures, finding less inherent risk in the latter. *See*
15 *id.* at 20-47. After *Buckley v. Valeo*, the Commission nevertheless determined in an
16 enforcement matter that Section 432(e) (now Section 30102(e)) precluded a candidate’s
17 authorized campaign committee from making expenditures on behalf of another candidate.
18 *See* Conciliation Agreement ¶ IV.13, MUR 2841 (Jenkins) (Dec. 11, 1992) (“In the
19 Commission’s view, the Act precludes a principal campaign committee from making
20 expenditures on behalf of another candidate, thus supporting more than one candidate, and
21 still remaining a principal campaign committee.”).¹¹

¹¹ MUR 2841 (Jenkins) involved payments by a congressional candidate’s principal campaign committee for newspaper ads endorsing and advocating the nomination of a presidential candidate. The Commission found probable cause to believe the Jenkins Committee violated Section 432(e) (now Section 30102(e)) among other provisions of the Act. Based on evidence of coordination between the committees, the Commission also

1 In a subsequent enforcement matter, MUR 3676 (Stupak), congressional candidate
2 Bart Stupak's authorized committee ran an advertisement that stated "Bart Stupak supports
3 Bill Clinton for President." Citing MUR 2841, this Office concluded that Section 432(e)(3)
4 (now Section 30102(e)(3)) prohibited authorized committees from making independent
5 expenditures. First Gen. Counsel's Rpt. at 6, 11-13, MUR 3676 (Stupak). The Commission,
6 however, rejected OGC's recommendation to find unlawful "support," see Certification for
7 MUR 3676 (Stupak) (Jan. 11, 1995), though the four Commissioners did not agree on the
8 reasoning for that decision. Three Commissioners based their conclusion on their belief that
9 the advertisement did not expressly advocate the election of Bill Clinton, while one rejected
10 the conclusion that Section 432(e)(3) (now Section 30102(e)(3)) constructively barred
11 authorized committees from making independent expenditures on behalf of other federal
12 candidates.¹²

13 After those matters were decided, the Supreme Court addressed a similar issue in
14 *Colorado Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604 (1996).
15 The Court found that the potential for or appearance of corruption — which the *Buckley* Court
16 found sufficient to justify limiting contributions — was not present to an extent that would

concluded that the expenditures constituted in-kind contributions. Accordingly, the matter was resolved by acceptance of a conciliation agreement which included admissions of violations of 2 U.S.C. §§ 441a(a)(1)(A), 432(e), and 441d (now 52 U.S.C. §§ 30116(a)(1)(A), 30102(e), and 30120) and a civil penalty based on the Section 441a and 441d (now Section 30116 and 30120) violations. The Commission took no action with respect to the Jenkins Committee's authorized status.

¹² In a Statement of Reasons dated February 8, 1995, Commissioner Thomas explained that, "[i]n light of the Supreme Court's decision in *Buckley v. Valeo*, its immediate impact on Congress, the scant legislative history of § 432(e)(3) [now § 30102(e)(3)], and the incongruous results which flow from the Office of General Counsel's construction, I cannot believe that Congress intended § 432(e)(3) [now § 30102(e)(3)] to prohibit the making of independent expenditures by authorized political committees." Thomas Statement of Reasons at 5; see *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454 (1989) quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) ("Frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.").

1 justify limiting such independent spending by political parties on behalf of their candidates.
2 *Id.* at 617-19. Accordingly, the Court concluded that the First Amendment precludes
3 application of limits to independent campaign expenditures by political parties. *Id.*

4 Following *Colorado I*, the Commission again considered the question of whether
5 authorized committees can make independent expenditures. In MUR 5468R (Moretz), a
6 Congressional candidate was alleged to have made an excessive "political contribution" to
7 George W. Bush in the form of a television advertisement allegedly criticizing Democratic
8 presidential nominee John Kerry. There, OGC noted that, "*Colorado [] I* effectively
9 overturned a Commission regulation, 11 C.F.R. § 110.7(b)(4), which prohibited an entire
10 class of committees – party committees – from making independent expenditures." First Gen.
11 Counsel's Rpt. at 7, MUR 5468R (Moretz). OGC further reasoned that "In light of the
12 Supreme Court's ruling and rationale in *Colorado [] I*, it is unlikely that interpreting
13 432(e)(3) [now 30102(e)(3)] to prohibit independent spending by authorized committees
14 would withstand a constitutional challenge, at least as applied to these circumstances
15 involving a single, isolated communication that nominally 'supports' another candidate." *Id.*
16 OGC ultimately concluded that the advertisement was not an independent expenditure
17 because it did not contain express advocacy. *Id.* at 9-10. The Commission found no reason to
18 believe that the respondents violated the Act. *See* Certification for MUR 5468R (Moretz)
19 (Oct. 7, 2005).

20 Subsequently, in *Citizens United v. FEC*, the Supreme Court again confirmed that
21 "independent expenditures, including those made by corporations, do not give rise to
22 corruption or the appearance of corruption," and thus cannot constitutionally be limited.
23 558 U.S. 310, 357 (2010).

1 In this matter, the plain meaning of the term “support” used in Section 30102(e)(3)
2 (formerly Section 432(e)(3)) appears to apply to the advertisements at issue. Though
3 apparently not coordinated, the advertisements clearly expressly advocate for the election of
4 Kelly and McClung as discussed above.¹³ Further, the amounts expended by the McCain
5 Committee to create and air these advertisements exceeded the \$2,000 limit — the McCain
6 Committee disclosed independent expenditures for “media” and “media production” in
7 support of Ruth McClung and Jesse Kelly totaling \$91,872 each. *See* Friends of John McCain
8 Inc. 2010 Post-Gen. Report at 267-70. Further, though the Supreme Court has determined
9 that the threat of corruption posed by independent spending for candidates by individuals,
10 groups, political parties, and corporations is insufficient to limit such spending, the Court has
11 not dealt specifically with the issue of limits on independent spending by one candidate for
12 another candidate, and particularly not where the communications that were said to have
13 supported the other candidate included express advocacy for that other candidate.¹⁴
14 Nonetheless, in light of the Supreme Court rulings in both *Colorado I* and *Citizens United*, we
15 recognize it is unlikely that interpreting 30102(e)(3) (formerly 432(e)(3)) to prohibit
16 independent spending by authorized committees would withstand a constitutional challenge,
17 *i.e.*, that they can fairly be deemed more potentially corrupting than independent expenditures
18 by individuals, political parties or by corporations, each of which has a constitutional right to

¹³ We note that the McCain Committee also argues that the advertisements at issue were consistent with its authorized committee status because the communications ultimately supported Senator McCain's candidacy. McCain Resp. at 4. The Committee asserts that, in sum, the advertisements “ultimately furthered Senator McCain's candidacy, and references to other candidates were critical to that objective.” *Id.* Even accepting the McCain Committee's assertion that its actions are consistent with its status does not resolve the inquiry here, *i.e.*, whether the portions of the respective advertisements (and thus, the costs associated with those portions) that expressly advocate for McClung and Kelly impermissibly “support” those candidates.

¹⁴ *See* MUR 5468R (Moretz), where OGC's recommendation to find no reason to believe was limited to “circumstances involving a single, isolated communication that nominally ‘supports’ another candidate.” First Gen. Counsel's Rpt. at 7, MUR 5468R (Moretz).

1 make unlimited independent expenditures. Therefore, we recommend that the Commission
2 dismiss¹⁵ the allegation that John McCain and Friends of John McCain Inc. and Keith A.
3 Davis in his official capacity as treasurer violated 52 U.S.C. § 30102(e)(3)(A) (formerly
4 2 U.S.C. § 432(e)(3)(A)). Further, because the advertisements do not appear to have been
5 coordinated with the McClung and Kelly campaigns, we also recommend that the
6 Commission dismiss the allegations that Ruth McClung and Ruth McClung for Congress and
7 Anne Loftfield in her official capacity as treasurer, and Jesse Kelly and Kelly for Congress
8 and Kristen L. Smith in her official capacity as treasurer, received an excessive contribution
9 in the form of a coordinated communication. We further recommend that the Commission
10 close the file.

11 **III. RECOMMENDATIONS**

- 12 1. Dismiss the allegation that John McCain and Friends of John McCain Inc. and
13 Keith A. Davis in his official capacity as treasurer violated 52 U.S.C.
14 § 30102(e)(3)(A) (formerly 2 U.S.C. § 432(e)(3)(A));
15
16 2. Dismiss the allegation that Ruth McClung and Ruth McClung for Congress and
17 Anne Loftfield in her official capacity as treasurer received an excessive
18 contribution in the form of a coordinated communication;
19
20 3. Dismiss the allegation that Jesse Kelly and Kelly for Congress and Kristen L.
21 Smith in her official capacity as treasurer received an excessive contribution in the
22 form of a coordinated communication;
23
24 4. Approve the Attached Factual and Legal Analysis;
25
26 5. Approve the appropriate letters; and
27

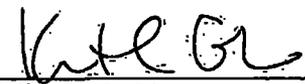
¹⁵ Because the Commission lacks the power to determine that a provision of the Act is unconstitutional, we recommend dismissal rather than no reason to believe. See *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (adjudication of constitutionality is generally outside administrative agency's authority); *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995) (noting in context of Commission's administrative enforcement process that "[i]t was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional").

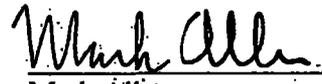
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6. Close the file.

Daniel A. Petalas
Associate General Counsel
for Enforcement

9/30/14
Date

BY: 
Kathleen Guith
Deputy Associate General Counsel
for Enforcement


Mark Allen
Acting Assistant General Counsel


Tracey L. Eigon
Attorney